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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re

Amendment of Part 74 of the Commission's
Rules With Regard to the Instructional
Television Fixed Service

)
)
) MM Docket No. 93-24
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)

COMMENTS OF
THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and
pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its initial

improving processing efficiency.”^{2/} That is an objective WCA wholeheartedly applauds. As the *NPRM* recognizes, in recent years the Commission has been called upon to process an ever increasing number of applications for new and modified ITFS facilities.^{3/} Despite yeoman’s service by an undermanned processing staff, the backlog of ITFS applications has grown to unacceptable proportions.

Under the current A/B cut-off approach to processing, it is not uncommon for twelve months or more to pass between the time an ITFS application is filed and the time it is granted. One of the most pressing problems facing wireless cable operators today is the delay associated with the processing of ITFS applications. In many markets, system launches are being delayed because ITFS stations that will provide necessary excess capacity have yet to be licensed. In other markets, existing systems are unable to provide truly effective competition to cable because they are operating without sufficient channel capacity, awaiting the processing of ITFS applications filed long ago. Since implementation of a window filing system should ultimately increase processing speed by reducing the amount of time devoted to the processing of each application, the concept is certainly worth exploring.^{4/}

^{2/} *Id.* at ¶ 7.

^{3/} *See id.* at ¶ 5.

^{4/} That exploration, however, should be conducted in as rapid a manner as possible. WCA certainly understands the motivation behind the Commission’s decision to impose a freeze on the filing of most applications for new ITFS facilities and major modifications of authorized facilities pending the completion of this proceeding. *See NPRM, supra* note 1, at ¶ 9. By the same token, the Commission must understand that the freeze is substantially hampering the ability of many wireless cable operators to secure the channel capacity needed to offer a viable service. Obviously, if wireless cable is to achieve the Commission’s objective of providing effective competition to cable, the Commission must move rapidly to resolve the issues raised in the *NPRM* so it can lift the ITFS application freeze.

I. THE COMMISSION SHOULD ASSURE THAT IMPLEMENTATION OF A WINDOW FILING SYSTEM FOR THE ITFS NOT INADVERTENTLY INCREASE DELAYS IN ITFS APPLICATION PROCESSING.

While WCA does not oppose the use of a filing window for ITFS, WCA is concerned that without other changes in the ITFS application processing system, adoption of the proposal advanced in the *NPRM* could have adverse consequences for America's educational community and the wireless cable industry alike. The problem WCA foresees is that adoption of a window filing procedure will further encourage those who abuse the ITFS excess capacity leasing rules for speculation or greenmail, while forcing those who are legitimately developing wireless cable systems to flood the Commission with ITFS applications in order to protect themselves from speculators and greenmailers.

As the comments submitted to the Commission in its recently concluded PR Docket No. 92-80 illustrated with crystalline clarity, speculators and greenmailers are already wreaking havoc in the wireless cable industry by abusing the ITFS application process.^{5/} With all due respect, WCA submits that the ITFS speculators and greenmailers have been able to thrive because the Commission has allowed them to. Just as the Commission's lackadaisical approach during the

^{5/} See, e.g. Comments of Emerald Enterprises, Inc., at 12 (filed June 29, 1992) ("The Commission is well aware of the modus operandi of firms such as Rural Vision, which enter lease agreements with hapless local schools only to hold critical channels for a king's ransom, utterly beyond the reach of wireless cable operators unless they accede to absurd lease demands"); Comments of Fletcher, Heald & Hildreth, at 9 (filed June 29, 1992) ("Anyone who has substantial experience in the wireless cable industry knows of RuralVision, its abuses of process in ITFS applications filed by its proxy school systems, and other ITFS speculators who make filings to extort money from serious wireless cable operators"); Comments of WJB-TV Ft. Pierce Limited Partnership, at 10 (filed June 29, 1992) ("WJB is mindful of the large number of Petitions to Deny that have been filed against [one] particular entity, many of which allege improper, dishonest, and even illegal conduct"). A recent newspaper article regarding another alleged ITFS speculator is annexed as Attachment A.

Sadly, all too often this safety valve has proven critical. The legitimate system developer takes great care in selecting its ITFS partners, since the continued availability of excess ITFS capacity depends on the ability of the ITFS licensee to meet its ongoing programming obligations under Section 74.931(e) of the Commission's Rules. Moreover, wireless cable operators recognize that when their ITFS licensees transmit high quality educational programming, that programming can give wireless cable a competitive advantage in the marketplace. By the same token, the more knowledgeable educational institutions are quite careful about entering into ITFS excess capacity leases and undertaking the obligations of a Commission licensee. Excess capacity lease agreements are carefully negotiated, and a great deal of thought goes into the preparation of the FCC Form 330. Thus, it can be a time-consuming process for a wireless cable operator and an educational institution serious about using the ITFS to negotiate an excess capacity lease and prepare a detailed FCC Form 330.^{8/} While this is happening, speculators can actually beat the legitimate wireless operator to the Commission's door by use of standardized leases and "cookie cutter" applications.

WCA fears that if the window filing system is implemented, speculators will inundate the Commission with insincere ITFS applications. If the speculators have proven one thing, they have proven that there are plenty of ITFS eligibles willing to prostitute themselves for immediate

^{8/} The *NPRM* is correct in observing that excess capacity leases have become more uniform over time. See *NPRM*, *supra* note 1, at ¶ 7. Indeed, RuralVision South, Inc. and RuralVision Central, Inc. have entered into hundreds of virtually identical excess capacity agreements with unsophisticated ITFS eligibles. However, the more knowledgeable ITFS eligibles still aggressively negotiate payment terms, channel availability, recapture provisions and many other terms. While the agreements entered into by these more knowledgeable ITFS eligibles are superficially similar to those who have become pawns for the speculators, they take far longer to negotiate.

financial gain. The Commission must assume that, using the same "cookie-cutter" excess capacity lease agreements and stock FCC Form 330s that have caused the current backlog, the speculators and greenmailers will inundate the Commission with applications during the first window. Knowing that there is a substantial risk this will occur, every legitimate wireless cable system developer will also have to make certain that it has ITFS affiliates file applications by the

Second, the Commission should adopt, at least on an interim basis, a system for prioritizing ITFS application processing so as to assure that scarce staff resources are devoted to the applications for new and modified ITFS stations that are most likely to become parts of operating wireless cable systems quickly.

Any wireless cable operator should be permitted to request expedited processing of an application filed by an ITFS affiliate (and any mutually-exclusive applications) upon a demonstration that it has secured through access to licensed MDS and ITFS stations, cut-off MDS applications that are not mutually exclusive with other timely filed applications, and/or proposed ITFS stations (including those in issue) totalling at least twelve channels (including at least four MDS channels). ^{9/} The Commission should extract a *quid pro quo* from those who would benefit from expedited processing -- a commitment to rapid construction of the proposed facilities. Those who want the Commission to hurry should be willing to do so themselves. WCA suggests that the Commission require both (1) that the equipment necessary to construct a facility authorized on an accelerated basis be ordered within fourteen days after the expedited applications have been granted, and (2) that any facility authorized as a result of expedited processing be constructed within six months after the applications have been granted. ^{10/} This should provide adequate time to secure and install equipment. Extensions should only be granted

^{9/} In the *Second Report and Order* in General Docket No. 90-54, the Commission recognized that only those who have secured at least four MDS channels in a market are likely to construct a wireless cable system, and WCA agrees. *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6792, 6803 (1991).

^{10/} Normally, ITFS stations must be constructed within eighteen months.

in the most compelling of circumstances, such as the inability of manufacturers to deliver equipment that was timely ordered, or accidental damage to essential equipment.

II. THE COMMISSION SHOULD PROHIBIT THE FILING OF ITFS APPLICATION AMENDMENTS ESTABLISHING ELIGIBILITY OR IMPROVING COMPARATIVE STANDING AFTER THE CLOSING OF THE WINDOW.

Although not addressed in the *Report and Order*, substitution of a window filing system will necessarily impact the Commission's current policy of permitting applicants to amend their proposals to demonstrate eligibility and improve their comparative standing until the B cut-off date. WCA suggests that if a window filing system is adopted, applicants should be barred from submitting amendments that demonstrate eligibility, improve comparative standing or seek rule waivers after the window closes. This will eliminate the current situation where many applicants, particularly those affiliated with RuralVision, impose an unnecessary burden on the processing staff and other applicants by continually amending deficient applications to establish eligibility, improve their comparative position and seek waivers of the four ITFS channel per market limitation.^{11/} In addition, the Commission should employ this opportunity to eliminate the current uncertainty over when local ITFS applicants proposing to serve unaffiliated receive sites are required to submit documentation specified in Section 74.913(d)(4) from those receive

^{11/} In perhaps the most egregious case, non-local entities affiliated with RuralVision applied for the five ITFS channel groups in Cooktown, GA. The applicants for the ITFS channels in nearby Dothan, AL petitioned to deny on the A cut-off date, demonstrating that the Cooktown applicants had failed to seek a waiver of the Section 74.902(d) four channel rule, failed to provide the receive site letters required of non-local applicants by Section 74.932(a)(5) of the Rules, failed to demonstrate establishment of a local programming committee as required by Section 74.932(a)(5) of the Rules, and were proposing to serve schools that did not want the service. In response, prior to the B cut-off date, RuralVision's affiliates amended their applications to seek a waiver of Section 74.902(d), eliminate their initially proposed receive sites, add new ones, and submit the receive site letters required by Section 74.932(a)(5). See File Nos. BPLIF-920319DL, et al.

sites in order to have the students enrolled at those receive sites credited during a Section 74.913(d) tie-breaker proceeding. The rules are clear that the receive sites had to be applied for by the B cut-off date. While the staff has recently taken the position that the Section 74.913(d)(4) documentation is also due at that time, the rules were ambiguous prior to the staff pronouncement. To avoid any future uncertainty, WCA recommends that the Commission mandate that all documentation required to conduct a Section 94.913(d) tie-breaker be submitted by the close of the filing window.

III. FILING WINDOWS SHOULD BE OPEN AS OFTEN AS POSSIBLE SO THAT WIRELESS CABLE SYSTEMS DEVELOPMENT IS NOT DELAYED.

If the Commission does decide to implement the window filing period for ITFS, it is essential that windows be opened as frequently as possible. If windows are opened infrequently, then the licensing of new and modified ITFS stations critical to the development of wireless cable will necessarily be delayed. WCA does not believe that there is any need to coordinate the opening of filing windows with National Telecommunications and Information Administration

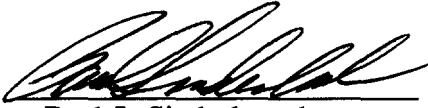
(“NITFA”) and the Commission should continue to accept and process

the opening of a window. That is the same amount of time the A cut-off period extends under the current version of Section 74.911(c), and WCA is aware of no situation in which a prospective ITFS was unable to file within the time afforded. If more than sixty days advance notice of the opening of a window is given, then it is doubtful that there will be any material improvement in the speed at which ITFS stations are licensed. Similarly, if windows are opened for an unduly long time, the time between windows will necessarily be longer. Therefore, WCA suggests that windows be of five working days duration. This should be ample to assure that no ITFS eligible, no matter how unsophisticated in the procedures for filing an ITFS application, can submit its Form 330 in timely fashion.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to adopt the proposal set forth in the *NPRM*, subject to the additional rules and policies advanced above.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
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